Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–424 OF 2010
ZALEHA ZAHARI, ABU SAMAH AND MOHD HISHAMUDIN JJCA
15 OCTOBER 2012

Administrative Law — Judicial review — Review of Minister's decision to refuse disclosure and access to documents — High Court granted declaration, certiorari and mandamus to respondents — Appeal against High Court decision — Whether respondents had locus standi to apply for judicial review — Whether respondents adversely affected by Minister's refusal to grant MTUC access to documents — Whether Minister was in breach of any fundamental or legal rights of respondents — Whether High Court erred in law and in fact in granting respondents declaration, certiorari and mandamus

Evidence — Documentary evidence — Judicial review of Minister's decision to refuse disclosure and access to documents — Whether documents were official secret documents — Whether documents were detrimental to national security or public interest — Whether respondents' legitimate expectation to documents could defeat express provision in Official Secrets Act that prohibited wrongful or unauthorised communication of any official secret

On 15 December 2004 the Government of the State of Selangor, the Federal Government and a company known as Syarikat Bekalan Air Selangor ('SYABAS') entered into a tripartite agreement ('the concession agreement') whereby SYABAS was granted a 30-year concession to supply treated water to the state of Selangor and Federal Territory according to the water tariffs provided therein. Under the concession agreement, SYABAS was entitled to increase the water tariffs if it managed to achieve a 5% reduction in the non-revenue water. Subsequently, SYABAS had applied for an increase of the water tariffs by 15%. This increase in water tariffs was based on an audit report, which allegedly confirmed that SYABAS had achieved a 5% reduction in non-revenue water. Sometime in October 2006 the Minister had announced that SYABAS had met the performance target and was thus eligible to a 15% increase in water tariffs with effect from 1 November 2006. The Malaysian Trade Union Congress ('the MTUC'), a society of trade unions, requested the Minister to furnish them with a copy of the concession agreement and the audit report justifying the 15% increase in water tariffs. The Minister refused to accede to MTUC's request on the grounds that the two documents were classified as official secret documents. The MTUC and 13 others ('the

respondents') filed an application for judicial review of the Minister's refusal to disclose the concession agreement and the audit report ('the two documents'). By way of this application the respondents sought a declaration that they and/or the general public had a right to have access to the two documents or alternatively that the two documents were public documents. The respondents also sought an order of certiorari to quash the Minister's decision denying them access to the two documents and an order of mandamus directing the Minister to disclose the contents of the two documents. MTUC and the other respondents claimed that they were entitled to the two documents and the Minister's decision denying them access to the documents was unreasonable and that the Minister had failed to consider relevant considerations in arriving at his decision. The appellants also claimed that there should not be unreasonable profiteering given that the supply and distribution of treated water had been privatised and that they had a legitimate expectation that the Minister would act in a responsible manner. The High Court granted the declaration on the grounds that the concession agreement was executed with public interest and that it was not detrimental to national security. Hence this appeal to set aside the decision of the Judicial Commissioner ('JC'). The appellants appealed on the grounds that the JC had erred in concluding that the respondents had locus standi to apply for judicial review and that she erred in law and in fact in granting them the declaration, certiorari and mandamus.

Held, allowing the appeal with costs:

(1) (per **Abu Samah and Zaleha Zahari JJCA**) As MTUC's request for access and disclosure of the two documents had been rejected by the Minister, it was adversely affected by the decision of the Minister and as such, had satisfied the test of threshold locus standi under O 53 r 2(4) of the Rules of the High Court 1980 ('RHC'). However, the second to 14th respondents, who had not made a similar request for disclosure and access to the two documents, had not shown that they were adversely affected by the decision of the Minister. These respondents' dissatisfaction with the decision of the Minster in rejecting MTUC's application did not make them persons who were adversely affected by the Minister's decision. As such, the second to 14th respondents had not satisfied the test of threshold locus standi under O 53 r 2(4) and on this ground alone their application should have been dismissed (see paras 54–56).

(2) (per **Abu Samah and Zaleha Zahari JJCA**) Although MTUC was 'adversely affected' by the Minster's refusal of its application to the two documents, it had not shown that it had a fundamental or legal right to have access and disclosure of the concession agreement and the audit report and that those rights had been infringed. This was not a case where MTUC or its members had been denied outright access to treated water in breach of their alleged fundamental right but an alleged right of access to documents that had been requested for. In Malaysia, members of the

public had no right to access documents relating to the operation of government departments and documents that were in the possession of government Ministers or agencies. In this situation, the Minister was clearly not in breach of any fundamental or legal rights of MTUC or any of the respondents, when he denied MTUC access to the two documents. Thus, the High Court erred in granting the declaration to MTUC (see paras 68–70).

(3) (per **Abu Samah and Zaleha Zahari JJCA**) On the available evidence, it had not been shown that the Minster had acted in excess of his authority in rejecting MTUC's application for the concession agreement and the audit report. Thus, the High Court erred in granting the order of certiorari to MTUC without determining whether MTUC had any legal right to the two documents or the Minister had acted in breach of MTUC's legal right in denying access to those documents (see para 76).

(4) (per **Abu Samah JCA**) Upon scrutinising the affidavits in support of MTUC's application it was found that the deponent of the said affidavits had not complied with s 45 of the Specific Relief Act 1950 ('the SRA'). The legal effect of non-compliance with ss 44 and 45 of the SRA meant that the granting of the order of mandamus was bad in law and made without any clear legal basis (see para 78).

(5) (per **Abu Samah JCA**) The averment in the deponent's affidavit that the two documents were classified as confidential was not seriously challenged. The contention that these documents were not detrimental to national security or public interest was irrelevant in determining whether or not they were classified as official secret. Thus, the respondents' assertion that they had a legitimate expectation to those documents could not be sustained to defeat an express provision in the Official Secrets Act 1972 ('the OSA'), which prohibited wrongful or unauthorised communication of any official secret (see paras 83–84).

(6) (per **Mohd Hishamudin JCA, dissenting**) The respondents were adversely affected by the Minister's refusal to disclose the contents of the two documents. The respondents were residents of Selangor and therefore consumers of the treated water while SYABAS enjoyed a monopolistic position in relation to consumers of treated water in Selangor. Thus, the increase in water tariffs, which was triggered by the concession agreement and the audit report, would have an adverse impact on the respondents as consumers. Further, the Minister in his reply to MTUC had never taken the position that the latter had no right to have sight of the two documents sought but that he was under no duty to make public disclosure of those documents by reason of their confidential status. However, the audit report was not protected by the OSA because there was no evidence that it had been classified as official secret under the OSA prior to it being produced before the cabinet. The

interpretation that a non-official secret document would automatically become an official secret document the moment it was produced before the cabinet was a misconception. The deponent of the affidavit did not explain why the audit report must be classified as official secret or why its disclosure would be detrimental to the national security or public interest (see paras 115–117, 123, 128–129.).

(7) (per **Mohd Hishamudin JCA, dissenting**) The respondents also had a legitimate expectation as members of the public, who were affected in the decision making process, to be treated fairly. As a matter of law, a legitimate expectation would arise when there was a clear and unambiguous representation made by a public authority, and in the present case, by reason of the public assurances that the Minister had made. Hence a duty to make disclosure had arisen by reason of the principle of legitimate expectation (see paras 135, 140 & 161).

(8) (per **Mohd Hishamudin JCA, dissenting**) The Minister could not rely on his contractual obligation by reason of cl 45 of the concession agreement as a basis for his refusal for the disclosure of the concession agreement. Such contractual obligation of non-disclosure did not stand in the way of judicial consideration of public interest (see paras 147 & 150).

[Bahasa Malaysia summary

Pada 15 Disember 2004 Kerajaan Negeri Selangor, Kerajaan Persekutuan dan syarikat yang dikenali sebagai Syarikat Bekalan Air Selangor ('SYABAS') telah memasuki perjanjian tiga pihak ('perjanjian konsesi') yang mana SYABAS diberikan konsesi 30 tahun untuk membekal air yang dirawat kepada negeri Selangor dan Wilayah Persekutuan menurut tarif-tarif air yang diperuntukkan dalam perjanjian tersebut. Di bawah perjanjian konsesi itu, SYABAS berhak menaikkan tarif-tarif air jika ia berjaya mencapai pengurangan 5% dalam air tanpa keuntungan. Berikutan itu, SYABAS telah memohon kenaikan kepada tarif-tarif air sebanyak 15%. Kenaikan dalam tarif-tarif air ini adalah berdasarkan laporan audit, yang dikatakan telah mengesahkan bahawa SYABAS telah mencapai pengurangan 5% dalam air tanpa keuntungan. Sekitar bulan Oktober 2006 Menteri telah mengumumkan bahawa SYABAS telah mencapai sasaran prestasi dan dengan itu layak menaikkan 15% dalam tarif-tarif air, berkuat kuasa mulai 1 November 2006. Kongres Kesatuan Sekerja Malaysia ('MTUC'), sebuah persatuan kesatuan sekerja, meminta Menteri memberi mereka salinan perjanjian konsesi tersebut dan laporan audit bagi mewajarkan kenaikan 15% dalam tarif-tarif air tersebut. Menteri enggan bersetuju dengan permintaan MTUC atas alasan bahawa kedua-dua dokumen tersebut diklasifikasikan sebagai dokumen-dokumen rahsia rasmi. MTUC dan 13 yang lain ('responden-responden') telah memfailkan permohonan untuk semakan kehakiman terhadap keengganan Menteri untuk mendedahkan perjanjian konsesi dan laporan audit tersebut ('dua dokumen tersebut').

Melalui permohonan ini responden-responden memohon deklarasi agar mereka dan/atau pihak awam diberi hak mendapatkan dua dokumen tersebut atau secara alternatif agar dua dokumen tersebut dijadikan dokumen-dokumen awam. Responden-responden juga memohon perintah certiorari untuk membatalkan keputusan Menteri yang menafikan mereka mendapat dua dokumen tersebut dan perintah mandamus mengarahkan Menteri mendedahkan kandungan dua dokumen tersebut. MTUC dan responden-responden lain mendakwa bahawa mereka berhak terhadap dua dokumen tersebut dan keputusan Menteri menafikan mereka daripada mendapat dokumen-dokumen tersebut adalah tidak munasabah dan bahawa Menteri tersebut telah gagal mengambil kira pertimbangan relevan apabila tiba kepada keputusannya. Perayu-perayu juga mendakwa bahawa tidak sepatutnya terdapat kautan keuntungan berdasarkan bekalan dan pengagihan air yang dirawat telah pun diswastakan dan bahawa mereka mempunyai jangkaan bahawa Menteri akan bertindak secara bertanggungjawab. Mahkamah Tinggi memberikan deklarasi atas alasan bahawa perjanjian konsesi telah disempurnakan demi kepentingan awam dan bahawa ia tidak memudaratkan keselamatan negara. Justeru itu rayuan ini telah dibuat agar diketepikan keputusan pesuruhjaya kehakiman ('PK'). Perayu-perayu telah merayu atas alasan bahawa PK terkhilaf dalam memutuskan bahawa responden-responden mempunyai locus standi untuk memohon semakan kehakiman dan bahawa beliau terkhilaf dari segi undang-undang dan fakta apabila memberikan mereka deklarasi, certiorari dan mandamus tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Abu Samah dan Zaleha Zahari HHMR**) Oleh sebab permintaan MTUC untuk mendapatkan dan mendedahkan dua dokumen tersebut telah ditolak oleh Menteri, adalah bertentangan kesannya dengan keputusan Menteri dan oleh itu, telah memenuhi ujian nilai ambang locus standi di bawah A 53 k 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Walau bagaimanapun, responden-responden kedua hingga 14 yang tidak membuat permintaan sama untuk pendedahan dan pemerolehan dua dokumen tersebut, tidak menunjukkan bahawa mereka terjejas dengan keputusan Menteri tersebut. Perasaan tidak puas hati responden-responden tersebut dengan keputusan Menteri yang menolak permohonan MTUC tidak menjadikan mereka terjejas dengan keputusan Menteri. Oleh itu, responden-responden kedua hingga 14 tidak memenuhi ujian nilai ambang locus standi di bawah A 53 k 2(4) dan atas alasan ini sahaja permohonan mereka patut ditolak (lihat perenggan 54–56).

(2) (oleh **Abu Samah dan Zaleha Zahari HHMR**) Walaupun MTUC adalah 'adversely affected' oleh keengganan Menteri terhadap permohonannya untuk dua dokumen tersebut, ia tidak menunjukkan bahawa ia mempunyai hak asasi atau di sisi undang-undang untuk

mendapat dan mendedahkan perjanjian konsesi dan laporan audit tersebut dan bahawa hak-hak tersebut telah dilanggar. Ini bukan kes di mana MTUC atau ahli-ahlinya dinafikan perolehan sebenar-benarnya kepada air yang dirawat yang melanggar hak asasi yang dikatakan mereka tetapi hak mendapat dokumen-dokumen tersebut yang dikatakan telah diminta oleh mereka. Di Malaysia, pihak awam tidak mempunyai hak mendapat dokumen berkaitan operasi jabatan kerajaan dan dokumen-dokumen dalam milikan Menteri kerajaan atau agensi. Dalam keadaan ini, Menteri jelas tidak melanggar apa-apa hak asasi atau di sisi undang-undang MTUC atau mana-mana responden-responden tersebut apabila beliau menafikan MTUC akses mendapatkan dua dokumen tersebut. Oleh itu, Mahkamah Tinggi terkhilaf dalam memberikan deklarasi tersebut kepada MTUC (lihat perenggan 68–70).

(3) (oleh **Abu Samah dan Zaleha Zahari HHMR**) Berdasarkan keterangan yang ada, ia tidak dapat dibuktikan bahawa Menteri telah bertindak melampaui kuasanya dengan menolak permohonan MTUC untuk mendapat perjanjian konsesi dan laporan audit tersebut. Oleh itu Mahkamah Tinggi terkhilaf kerana memberikan perintah certiorari kepada MTUC tanpa menentukan sama ada MTUC mempunyai apa-apa hak di sisi undang-undang terhadap dua dokumen tersebut atau Menteri telah bertindak melanggar hak di sisi undang-undang MTUC kerana menafikan akses terhadap dokumen-dokumen tersebut (lihat perenggan 76).

(4) (oleh **Abu Samah HMR**) Setelah meneliti afidavit-afidavit sokongan kepada permohonan MTUC adalah didapati bahawa deponen afidavit-afidavit tersebut tidak mematuhi s 45 Akta Relief Spesifik 1950 ('ARS'). Kes undang-undang ketidakpatuhan ss 44 dan 45 ARS bererti pemberian perintah mandamus adalah salah dari segi undang-undang dan telah dibuat tanpa apa-apa asas undang-undang yang jelas (lihat perenggan 78).

(5) (oleh **Abu Samah HMR**) Penegasan dalam afidavit deponen bahawa dua dokumen tersebut diklasifikasikan sebagai sulit tidak dicabar secara serius. Hujah bahawa dokumen-dokumen tersebut tidak memudaratkan keselamatan negara atau kepentingan awam adalah tidak relevan dalam menentukan sama ada atau tidak ia tidak diklasifikasikan sebagai rahsia rasmi. Oleh itu, penegasan responden-responden bahawa mereka mempunyai jangkaan sah terhadap dokumen-dokumen tersebut tidak boleh dikekalkan untuk menidakkan peruntukan nyata dalam Akta Rahsia Rasmi 1972 ('ARR'), yang melarang komunikasi yang menyalahi undang-undang atau tidak diberi kuasa untuk apa-apa rahsia rasmi (lihat perenggan 83–84).

(6) (oleh **Mohd Hishamudian HMR, menentang**) Responden-responden terjejas dengan teruk oleh keengganan Menteri untuk mendedahkan

kandungan dua dokumen tersebut. Responden-responden merupakan penduduk Selangor dan oleh itu pengguna air yang dirawat manakala SYABAS menikmati kedudukan monopoli berkaitan pengguna air yang dirawat di Selangor. Oleh itu, kenaikan dalam tarif-tarif air, yang tercetus oleh perjanjian konsesi dan laporan audit, akan mempunyai kesan bertentangan pada responden-responden sebagai pengguna. Bahkan, Menteri dalam jawapannya kepada MTUC tidak pernah membuat keputusan bahawa ia tiada hak untuk melihat dua dokumen tersebut yang dipohon tetapi bahawa dia tiada tanggungjawab untuk membuat pendedahan umum untuk dokumen-dokumen tersebut dengan sebab statik rahsia tersebut. Walau bagaimanapun, laporan audit itu tidak dilindungi oleh ARR kerana tiada keterangan bahawa ia telah diklasifikasikan sebagai rahsia rasmi di bawah ARR sebelum ia dikemukakan ke kabinet. Pentafsiran bahawa dokumen rahsia yang tidak rasmi secara automatik menjadi dokumen rahsia rasmi pada saat ia dikemukakan ke Kabinet adalah suatu yang disalah tanggap. Deponen afidavit tidak menjelaskan kenapa laporan audit perlu diklasifikasikan sebagai rahsia rasmi atau kenapa pendedahannya akan menjejaskan keselamatan negara atau kepentingan awam (lihat perenggan 115–117, 123, 128–129).

(7) (oleh **Mohd Hishamudin HMR, menentang**) Responden juga mempunyai jangkaan sah sebagai pihak awam, yang terjejas dalam proses membuat keputusan, untuk diberi keadilan. Dari segi undang-undang, jangkaan sah timbul apabila terdapat representasi yang jelas dan tidak samar dibuat oleh pihak berkuasa awam, dan dalam kes ini, oleh sebab jaminan awam yang dibuat oleh Menteri. Justeru suatu tanggungjawab untuk membuat pendedahan timbul oleh sebab prinsip jangkaan sah tersebut (lihat perenggan 135, 140 & 161).

(8) (oleh **Mohd Hishamudin HMR, menentang**) Menteri tidak boleh bergantung pada tanggungjawab kontraktualnya oleh sebab fasal 45 perjanjian konsesi sebagai asas kerana keengganannya membuat pendedahan perjanjian konsesi. Tanggungjawab kontraktual tanpa pendedahan sebegini tidak boleh menghalang pertimbangan kehakiman untuk kepentingan awam (lihat perenggan 147 & 150).]

Cases referred to

Commonwealth of Australia, The v John Fairfax & Sons Ltd (1980) 147 CLR 39, HC (refd)

Datuk Haji Dzulkifli bin Datuk Abdul Hamid v PP [1981] 1 MLJ 112; [1980] 1 LNS 91, FC (refd)

Food Corpn of India v Kamdhenu Cattle Feed Industries AIR 1993 SC 1601, SC (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (folld)

Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [1982] AC 617, HL (refd)
K Anandaraj a/l Krishnasamy v Dato' Dr Vijayasingam & Anor [2005] 7 MLJ 120; [2005] 4 CLJ 86, HC (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Mak Sik Kwong v Minister of Home Affairs, Malaysia [1975] 2 MLJ 168 (refd)
Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67, FC (refd)
O'reilly v Mackman [1983] 2 AC 237, QBD (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
R v Electricity Commissions Exp London Electricity Joint Committee Co (1920) Ltd [1924] 1 KB 171, CA (refd)
R v Monopolies and Mergers Commission, ex p Argyll Group plc [1986] 1 WLR 763, CA
R v Stafford Justices, ex p Stafford Corpn [1940] 2 KB 33, CA (refd)
R v Thomas Magistrates' Court Exp Greenbaum (1957) 55 LGR 129 (refd)
Rex v Northumberland Compensation Appeal Tribunal Exparte Shaw [1967] 2 All ER 986 CA; [1969] 1 All ER 208 HL (refd)
Ridge v Baldwin [1964] AC 40, HL (refd)
See Kok Kol @ See Liong Eng v Chong Kui Seng & Ors [2009] MLJU 1098 ; [2010] 2 CLJ 481, HC (refd)
Shri Dinesh Trivedi, MP & Ors v Union of India & Ors [1997] 4 SCC 306, SC (refd)
South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors [1980] 2 MLJ 165, PC (refd)
Takong Tabari v Government of Sarawak & Ors [1995] 1 CLJ 403, HC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)

Legislation referred to

Child Act 2001
Courts of Judicature Act 1964 s 25, Schedule, para 1
Federal Constitution art 8
Freedom of Information Act 1982 [AU]
Interpretation Acts 1948 and 1967 s 17A
Official Secrets Act 1972 ss 2, 2(1), 2A, 2C, 8, 16A
Right to Information Act 2005 [IND]
Rules of the High Court 1980 O 53, O 53 rr 1, 2(4)
Specific Relief Act 1950 ss 44, 44(1)(a), (b), (c), (d), (e), 45

A Supreme Court Rules 1977 [UK] O 53 r 3(5), (7)
Water Services Industry Act 2006 s 3(1)

Appeal from: Application for Judicial Review No R2–25–09 of 2007 (High Court, Kuala Lumpur).

B *Azizah Nawawi, (Senior Federal Counsel, Attorney General's Chambers) for the appellants.*
Malik Imtiaz Sarwar (Jenine Gill with him) (Malik Imtiaz Sarwar) for the respondents.
Ang Hean Leng (Lee Hishammudin Allen & Gledhill) for the respondents.
C *Aliff Benjamin bin Suhaimi (Thomas Philip) for the respondents.*
Gobind Singh Deo (Gobind Singh Deo & Co) for the respondents.

Zaleha Zahari JCA:

D

[1] This appeal was allowed by a majority with my brother, Mohd Hishamudin Hj Mohd Yunus, JCA, dissenting. My reasons in allowing this appeal are as follows.

E **[2]** At the outset it is pertinent to state that the Government of Selangor (the second respondent in the High Court), has been wrongly named a party to this appeal as the second respondent did not object to the application in the High Court and did not participate in the proceedings culminating in the decision which is the subject of this appeal.

F

BACKGROUND

[3] What transpired may be shortly stated. The Malaysian Trade Union Congress ('MTUC'), a society of trade unions (the first applicant in the High G Court/the first respondent in this appeal), had vide letter dated 7 November 2006 to the Minister of Energy, Water and Communications, (the first respondent in the High Court/the first appellant in this appeal, subsequently referred to as 'the Minister') requested the Minister to publicise/make public the agreement executed between the Government of Selangor, Government of H Malaysia and Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS') dated 15 December 2004 ('the concession agreement') as well an audit report.

[4] By another letter dated 23 November 2006 (exh 'RJ16') MTUC made I another request to the Minister, this time to furnish to them a copy of the audit report and the concession agreement.

[5] The Minister responded to MTUC's requests in terms of letter dated 23 November 2006 (exh 'RJ17') which, inter alia, states as follows:

Untuk makluman pihak tuan, Kementerian ini berpendapat bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS serta Laporan Audit tidak sesuai untuk didedahkan kepada umum memandangkan dokumen berkenaan adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT' dan 'RAHSIA' Kerajaan.

[6] MTUC and 13 others (the second to 14th applicants in the High Court/the second to 14th respondents in this appeal) then, on 15 Januray 2007, filed an application for judicial review for the following reliefs:

(a) a declaration that the applicants and/or general public have a right to have access to the audit report and the concession agreement;

(b) alternatively, a declaration that the audit report and the concession agreement are public documents and not official secret documents;

(c) an order of certioarari to quash the decision of the appellants denying the applicants access to the audit report and the concession agreement; and

(d) an order of mandamus directing the Minister to disclose the contents of the audit report and the concession agreement to the applicants and/or the general public.

[7] In paras 3–4 of the statement filed pursuant to O 53 r 3 of the High Court Rules 1980 ('the Rules'), the applicants' advanced the following reasons to support their application. The applicants contended that the decision of the Minister denying them access to the documents in issue was unreasonable; that the Minister had failed to consider relevant considerations and considered irrelevant considerations. According to the applicants there was a breach of art 8 of the Federal Constitution which required the Minister to act reasonably and in failing to give reasons for his decision contrary to the applicants legitimate expectation that the Minister would act in a responsible manner.

[8] In opposing the application on behalf of the Minister and the Government of Malaysia (the third respondent in the High Court/the second appellant in this appeal), paras 5 and 7 of the affidavit affirmed by Japar bin Abu on 18 January 2008 states as follows:

5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat 'SULIT' berasaskan klausa 45 Perjanjian Konsesi di mana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada perjanjian tersebut.

6. …

7. Saya menegaskan di sini bahawa Laporan Audit adalah dokumen berperingkat yang dikategorikan sebagai 'RAHSIA' kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan

diputuskan dalam mesyuarat Jemaah Menteri yang bersidang pads 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat 'Rahsia' di bawah Jadual kepada seksyen 2A Akta Rahsia Resmi, 1972.

[9] On 28 June 2010 the learned judicial commissioner High Court Kuala Lumpur granted an order in terms of all of the prayers prayed for by the applicants in the judicial review application together with costs. Hence this appeal.

THE APPEAL

[10] The appellants have advanced five grounds as to why the decision of the learned judicial commissioner should be set aside which are as follows: (a) erred in concluding that the applicants had locus standi to commence the judicial review application; (b) erred in failing to find that the audit report was an official secret document protected by s 2A of the Official Secrets Act 1972; (c) erred in holding that the Minister had failed to take into consideration the legitimate expectation of the applicants; (d) erred in failing to take into account the express provision of the concession agreement that it must remain confidential; (e) erred in finding that the documents contained no information that was detrimental to public interest or national security.

[11] The arguments before us was focused on two issues: firstly, locus standi of the applicants in file this application for judicial review; secondly, whether the application for the declaratory orders, certiorari and mandamus sought had been rightly granted.

THE LAW

[12] The legal provisions referred to in arguments before us are these. Section 25 read with para 1 of the Schedule to the Courts of Judicature Act 1964 is the empowering provision enabling the High Courts to grant orders of certiorari, declaration and mandamus. The power of the High Court can be exercised for a twofold purpose, namely; the enforcement of fundamental rights, and the enforcement of non-fundamental or ordinary rights (for any other purpose). Paragraph 1 of Schedule states as follows:

1 Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any orders, for the enforcement of the rights conferred by Part 11 of the Constitution, or for any of them, or for any purpose.

[13] On the court's power to issue an order of mandamus s 44 of the Specific Relief Act 1950 provides as follows:

> 44(1) A Judge may make an order requiring any specific act to be done … by any person holding a public office …
>
> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
>
> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
>
> (d) the applicant has no other specific and adequate legal remedy; and
>
> (e) the remedy given by the order applied for will be complete.

[14] Order 53 r 1 of the Rules prescribes the procedure to be followed in an application for judicial review and provides as follows:

> 1 Scope (O 53 r 1)
>
> (1) This Order shall govern all applications seeking the relief specified in Paragraph 1 to the Courts of Judicature Act 1964 and for the purposes therein specified.
>
> (2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

[15] Order 53 r 2(4) then provides:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[16] The learned judicial commissioner ruling that the applicants had locus standi to file this application for judicial review was grounded on the following: each and every applicant is a paying water consumer; had a real and genuine interest in the subject matter and would be adversely affected by an increase in water tariffs. According to the learned judicial commissioner this nexus sufficed to clothe them with locus to challenge the decision of the Minister. Her judgment on this issue states as follows:

> [13] From the above statements, I agree with learned counsel for the applicants' contention that the applicants are persons 'adversely affected' and not 'busy bodies, cranks and other mischief makers' by the decision of the first respondent. Each and

every applicant is a paying water consumer within the area covered by the concession agreement. With SYABAS now in monopoly over the distribution of treated water in the concession area, the applicants do not have an alternative access to treated water. If the water tariff is increased and they have to pay more money for water, they have no real choice to refuse to pay because there is no alternative supplier of water available. In addition thereto, water being essential for life is part of a constitutional right which can be implied under the Federal Constitution. On the facts and circumstances of this case, it is obvious that the applicants had a real and genuine interest in the subject matter. They are adversely affected by the increase in water tariff and in this regard there is a direct nexus with the decision of the first respondent's. I therefore hold the applicants have established they had a locus standi to bring this action.

[17] The senior federal counsel ('SFC') in her submissions had drawn our attention to the fact that in respect of public interest litigation the position in Malaysia was different from that in England as the SCR 1977 (England) is differently worded from that of the Malaysian provisions. This distinction was recognised by the Malaysian Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 30/G, where Abdul Hamid CJ (as His Lordship then was) said:

> The term 'sufficient interest' in the new English O 53, r 3(7) — which incidentally has no counterpart in our Rules of the High Court was sufficiently flexible to express a requirement which can vary as the relationship between the subject matter, the remedy sought and the applicant varies.

[18] At p 31/13-H, His Lordship continued:

> It is important to note, as I have earlier observed that O 53 r 3(7) introduced a common standing test namely that of 'sufficient interest.'
>
> It has been said that the modem approach to standing in England under the new O 53 can be summarised thus; provided that the applicant has an arguable case he will probably be given leave to apply for judicial review. At the full hearing, if he has a meritorious claim, the court will strive to accord locus standi so long as he is not a mere busybody with no legitimate complaint; see *RJF Gordon on Judicial Review Law and Procedure* — para 4-07 p 51.
>
> …
>
> But in Malaysia there is no provision in our Rules of the High Court equivalent to O 53 r 3(7) of the English Rules of the Supreme Court. Thus, in my view, there shall be stringent requirement that the applicant, to acquire locus standi, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v Union of Post Office Workers*, and also *Boyee*'s case (13) and this, I consider, to be the relevant test to apply when determining the question of standing.

[19] Justice Hashim Yeop Sani on this issue at p 41/B–C said:

> It can hardly be disputed that there is no single authoritative definition of an aggrieved person but in general it can be said that a person 'aggrieved' is not merely one who is dissatisfied with some act or decision but one who has been wrongly deprived of or has been refused something to which he is legally entitled. Any person can come to court for the protection or enforcement of his rights.

[20] On the facts of this case the request to the Minister for access and disclosure of the documents in issue and be furnished with a copy of the same was made by MTUC. The second to 14th applicants did not make such an application to the Minister. The Minister's reply was accordingly only addressed to the body that made the application to him, ie MTUC.

[21] Applying the principle enunciated by the Supreme Court decision in *Lim Kit Siang*, I am of the view that the learned judicial commissioner's approach of linking parties to the subject matter based on the English criteria of locus, which has different provisions, was misconceived. The requirement in Malaysia of having to establish a legal right under the law, a breach of such legal right which adversely affected the rights of such a person, effectively restricts public interest litigation.

[22] In respect of the second to 14th applicants I am of the view that these applicants had no locus standi under O 53 of the Rules to file an application for judicial review. These applicants dissatisfaction with the decision of the Minister in rejecting MTUC's application does not make them persons who were 'adversely affected' by the Minister's decision falling within the ambit of O 53. They were clearly strangers to the said application. The question of the second to 14th applicants being wrongly deprived of a fundamental or legal right does not accordingly arise. On this ground alone I am of the view that the application of the second to 14th applicants should have been dismissed.

[23] Whilst MTUC may be considered to fall within the term 'adversely affected' by reason of the Minister's refusal of their application, according to the law, to clothe them with locus, MTUC must establish that they have a fundamental right or a legal right (see *Lim Kit Siang*'s case) to have access and disclosure of the audit report and the concession agreement and that those rights had been infringed.

[24] The cause of action here is not a case of denial of access to water, but an alleged right of access to documents that had been requested for. The applicants' interest clearly was in the tariffs to be imposed in respect of water supplied. This has been dealt with in paras 30–31 of my brother, Abu Samah Nordin's, JCA's judgment.

[25] Our attention has also been drawn to the fact that in Malaysia there is

no law equivalent to the Australian Freedom of Information Act 1982 passed at the federal level applicable to all 'ministers, departments and public authorities'. Members of the public have certain rights of access including the right to access documents relating to the operation of government departments and documents that are in the possession of government Ministers or agencies. In India, the Right to Information Act 2005 gives citizens access to the records of the central and state governments. Citizens in India may request for information from a public authority, which must in turn reply within 30 days. The Indian Act applies to all States And Union Territories of India, except the State of Jammu and Kashmir — which is covered under a state-level law.

[26] In Malaysia, the SFC made reference to the Preamble to the Freedom of Information (State of Selangor) Bill 2010 an Enactment to *'enhance disclosure of information for the public interest, to provide to every individual an opportunity to access to information made by every department of the State'*. Section 5 of the Bill reads:

> Access to information
>
> 5(1) Any person may be given access to information made by every department.
>
> (2) If the information sought to be accessed by any person is contained in a document disclosure of which is subject to any written law, access to such information shall be subject to such written law.

[27] There is however no such federal law which allows the public to have such an access.

[28] In this situation I am of the view that the Minister cannot therefore be compelled to accede to the request made by MTUC. His decision was clearly not in breach of any fundamental right or the legal rights, be it of MTUC, or of any of the applicants, when he refused MTUC's request for access to the documents in issue.

[29] In respect of the application an order for mandamus, Sharma J in *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180, at p 182 held that the prerequisites for such an order are:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondent;

(c) whether such duty of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(d) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him (eg an appeal)

[30] The appellants' case was that the audit report was a scheduled document under Official Secrets Act 1972 (Act 88) and classified as official secret which cannot be divulged to the public. The Official Secrets Act 1972 deals with the prevention of unauthorised disclosure of official secrets and created offences for any such infringement.

[31] The term 'official secrets' as defined by s 2 of the Act 88 as follows:

> 'official secret' means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B.

[32] The documents specified in the Schedule are:

> Cabinet documents, records of decisions and deliberations including those of Cabinet committees;
>
> State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;
>
> Documents concerning national security, defence and international relations.

[33] These documents can only be disclosed if they had been declassified under s 2C of the Act which, states as follows:

> 2C A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service … may, at any time, declassify any document specified in the schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret.

[34] The well established principles expounded by the Court of Appeal in *See Kok Kol @ See Liong Eng v Chong Kui Seng & Ors* [2009] MLJU 1098; [2010] 2 CLJ 481 where Low Hop Bing JCA referred to *Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112; [1980] 1 LNS 91 where LP Salleh Abbas said in:

> It if the originator or the owner of the document treats it and the information contained in it as an official secret and clearly marks it and keeps it as such, it is not open to anyone to regard it as otherwise; and the law must give protection to such document or information even though it contains information generally known to the public.

[35] The powers and the duties to declassify the documents under Act 88 have been given to the relevant parties, not to the courts. The court should not usurp the power of the Minister concerned or public officer charged with the responsibility of such declassification.

[36] On the facts of this case the Minister's decision not to grant access to the concession agreement was not irrational as it was premised on cl 45 of the concession agreement. The Minister had acted within the parameters of the concession agreement when he refused MTUC's application for access to the concession agreement as the disclosure requires consent by all parties to the agreement.

[37] It would appear that the learned judicial commissioner had approached the judicial application on the premise of discovery of documents instead of reviewing the decision of the Minister. The courts have consistently held that in the absence of any pending actions against any defendant in court, the plaintiffs are not entitled for an order for pre-action discovery. See *K Anandaraj a/l Krishnasamy v Dato' Dr Vijayasingam & Anor* [2005] 7 MLJ 120; [2005] 4 CLJ 86.

CONCLUSION

[38] To conclude, it is my finding that the learned judicial commissioner erred in arriving at the decision which she did, in making a declaratory order that the applicants and/or the general public have a right to have access to audit report and concession agreement; in quashing the Minister's decision and in issuing an order of mandamus directing the Minister to disclose the contents of the audit report and concession agreement to the applicants and/or the general public.

[39] I accordingly allowed the appeal with costs and set aside the decision of the learned judicial commissioner.

Abu Samah JCA:

[40] This is an appeal by the first and second appellants who are dissatisfied with the decision of the learned judicial commissioner ('JC') in granting the respondents' application for judicial review under O 53 of the Rules of the High Court 1980 ('RHC') for the following reliefs:

(a) a declaration that the respondents and/or the public are entitled to access the concession agreement dated 15 December 2004 between Syarikat

Bekalan Air Selangor Sdn Bhd ('Syabas'), the State Government of Selangor and the Government of Malaysia, and the audit report 2005 relating thereto;

(b) an order of certiorari revoking the decision of the first appellant not to publish and/or disclose the concession agreement and the said audit report to the respondents; and

(c) an order of mandamus that the first appellant publish and/or disclose the concession agreement and the said audit report and their contents to the respondents and/or the public.

Leave to apply for judicial review was granted on 14 June 2007.

[41] The first respondent ('MTUC') filed its application for judicial review after the first appellant ('the Minister') turned down its request by a letter dated 7 November 2006 to publish the concession agreement together with the audit report for public knowledge and to allow it to have access to the said agreement and the audit report. The reason given by the Minister in a letter dated 4 December 2006 for rejecting the respondents' request is that the concession agreement and the audit report are 'SULIT' dan 'RAHSIA' ('Confidential and Secret').

[42] By this concession agreement, Syabas had been given a 30 year concession to supply treated water to the state of Selangor and Federal Territory according to the water tariffs as provided therein. It is the respondents' contention and belief, based on newspaper reports, that the second appellant ('the government') is expected to approve Syabas's application for an increase of water tariffs by 15% from January 2006, following an audit report that Syabas had met the performance target in reducing non revenue water ('NRW') that is lost through leakage. The agreement also contains a compensation clause in which the State Government of Selangor will have to pay compensation to Syabas in the event that Syabas is not allowed to raise water tariffs in accordance with the terms of the agreement. The respondents claim that the Minister had, sometime in October 2006 announced that Syabas had met the performance target and thus eligible for a 15% increase in the water tariffs. The Minister did not deny making the said announcement. In fact, in reply to the MTUC's letter, the Minister confirmed that Syabas had met the performance target and therefore eligible to get an increase in the water tariffs with effect from 1 November 2006.

[43] Learned counsel for the respondents submitted before us that the basis of the respondents' application for the declaration and the orders of certiorari and mandamus is that the government, as a fiduciary, has a responsibility to provide safe and affordable treated water and to ensure that unreasonable profiteering does not occur from the privatisation of supply and distribution of

A treated water; water being an inalienable and basic right to human existence and living. The respondents contend that they had a legitimate expectation that the government shall at all times ensure that they and the people of the Malaysia has access to safe drinking water.

B **[44]** It is the respondents' contention and belief that the audit report is significant as it provides the basis for the increase in the water tariffs.

[45] The learned judicial commissioner ('JC') granted all the reliefs sought by the respondents on the ground, inter alia, that:

C

> that the applicants are persons 'adversely affected' and not 'busy bodies, cranks and other mischief makers' with the decision of the first respondent. Each and every applicant is a paying water consumer within the area covered by the concession agreement. With SYABAS now in monopoly over the distribution of treated water in the concession area, the applicants do not have an alternative access to treated water. If the water tariff is increased and they have to pay more money for water, they have no real choice to refuse to pay because there is no alternative supplier of water available. In addition thereto, water being essential for life is part of a constitutional right which can be implied under the Federal Constitution. On the facts and circumstances of this case, it is obvious that the applicants had a real and genuine interest in the subject matter. They are adversely affected by the increase in water tariff and in this regard there is a direct nexus with the decision of the first respondent's. I, therefore hold the applicants have established they had a locus standi to bring this action.

D

E

F

[46] The other grounds given by the learned JC in allowing the application for judicial review are:

(a) the concession agreement was executed with public interest in mind and it is only fair that it be made public;

G

(b) the concession agreement and the audit report are not detrimental to national security;

(c) it is nonsensical to say that any document put before the Cabinet is automatically treated as 'RAHSIA' under s 2A of the Official Secrets Act 1972.

H

[47] The appellants' appeal against the decision of the learned JC is based on two grounds. Firstly, the learned JC erred in fact and in law in holding that the respondents had locus standi to apply for judicial review. Secondly, the learned JC erred in law and in fact in granting the declaration, certiorari and mandamus to the respondents.

I

[48] The learned senior federal counsel ('SFC') for the appellants contended

that the respondents had no standing to seek the declaration and the orders of certiorari and mandamus as they were not 'adversely affected' by the decision of the Minister. An applicant for judicial review against the decision of any public authority must first show that he is a person who is adversely affected by the said decision before he is entitled to make the application.

[49] This is expressly stated in O 53 r 2(4) of the RHC is which provides:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[50] The test of threshold locus standi in our courts is that as stated by the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 and the Supreme Court (as it then was) in *Government of Malaysia v Lim Kit Siang, United Engineering (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12. Abdoolcader J, in delivering the judgment of the Federal Court in the case of *Tan Sri Jaji Othman Saat* said (p 179):

> The sensible approach in the matter of locus standi in … declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared even though he could get no other relief, should suffice.

[51] Salleh Abas LP in *Lim Kit Siang*'s case reaffirmed the test as stated in *Tan Sri Othman Saat*'s case and stressed that there was no justification therefore for our courts to depart from the rule of locus standi accepted by the highest court in England prior to amendment of the current O 53 r 3(7) of the English Supreme Court Rules 1977.

[52] Abdul Hamid CJ (Malaysia) in the same case pointed out that the threshold test of locus standi under O 53 r 2(4) of the RHC is more stringent than that under O 53 r 3(7) of the English Rules of the Supreme Court:

> Thus, in my view, there shall be a stringent requirement that the applicant, to acquire locus standi, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v Union of Post Office Workers*, and also *Boyce*'s case and I consider this to be the relevant test to apply when determining the question of standing.

[53] By contrast O 53 r 3(7) of the SCR 1977 provides:

> (7) The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

Thus, an applicant for judicial review under the English rules needs only to show that he has a 'sufficient interest' in the matter to which the application relates.

[54] The learned SFC conceded before us that MTUC had threshold locus standi to apply for judicial review as a decision had been made by the Minister to reject its written request for access and disclosure of the agreement and the audit report. It is nevertheless submitted that the High Court should not have granted the respondents' application for judicial review at the end of the substantive hearing on the merits of the application, as they had not shown that that their legal rights or interests had been adversely affected by the Minister's decision: see *Tan Sri Othman Saat*, and *Lim Kit Siang*. The other respondents however did not make a similar request to the Minister and they could not claim that they were adversely affected by the Minister's decision.

[55] There is no doubt in my mind that MTUC has satisfied the test of threshold locus standi under O 53 r 2(4) of the RHC as it is adversely affected by the decision of the Minister who had rejected its request for the public disclosure of the agreement and the audit report and for access to them.

[56] The rest of the respondents, however, had not shown that they were 'adversely affected' by the decision of the Minister as none of them had made a similar request to him for the disclosure of and access to the agreement and the audit report. They had not, therefore, in my judgment, satisfied the test of threshold locus standi under O 53 r 2(4) of the RHC and whatever reliefs granted by the High Court must therefore be set aside.

[57] An applicant who had passed the test of threshold locus standi may not necessarily succeed when the issue of locus standi is considered on its merit. In *Tan Sri Othman Saat*'s case Abdoolcader J said:

> When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not.

[58] While the threshold test of locus standi under O 53 r 2(4) of the RHC is different from that under O 53 r 3(7) of the SCR 1977, (which came into force on 11 January 1978), the procedural steps in determining the issue of locus standi are, in my view no different from that under the English rules. These procedural steps may still be of assistance in arriving at the final decision as to whether or not an applicant may succeed in his application for judicial

review. Lord Diplock in *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 explained the procedure under O 53 r 3(7) SCR thus:

> The procedure under the new O 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or 'threshold', stage is regulated by r 3. The application for leave to apply for judicial review is made initially ex-parte, but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether 'it considers that the applicant has a sufficient interest in the matter to which the application relates'. So this is a 'threshold' question in the sense that the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first stage. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.

[59] Lord Wilberforce, in the *National Federation*'s case explained the procedure in this way. At the first stage, there may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all or no sufficient interest to support the application. In these cases it would be quite correct to refuse him leave to apply.

[60] But in other cases this will not be so. In these it is necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words the question of sufficient interest cannot in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context.

[61] Briefly the facts in the *National Federation*'s case are these. The National Federation, representing the self employed and small business, sought a declaration and an order of mandamus against the Inland Revenue Commissioners ('the IRC') to assess and collect arrears of income tax said to be due by a substantial number of casual workers who work for newspapers in Fleet Street. They were not happy that the IRC had entered into an arrangement with the employer and unions of these casual workers wherein the IRC would not investigate in tax lost in certain previous years if future tax could either be deducted at source or be properly assessed. The National Federation asserted that the IRC acted unlawfully in not pursing the claim for full amount of tax due. It claimed that the IRC had exceeded its powers in granting its amnesty.

[62] The divisional court granted leave ex-parte but at the hearing inter

parte, on Inland Revenue's objection, the divisional court held that the Federation had not 'sufficient interest' under O 53 r 3(5) of the Supreme Court Rules. On appeal by the National Federation the Court of Appeal (by a majority) allowed the appeal and dismissed the Inland Revenue's objection. On further appeal by the Inland Revenue, the House of Lords allowed the appeal and dismissed the application for judicial review. Lord Wilberforce held that as a matter of principle one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over assessed. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest.

[63] The procedural steps referred to in *National Federation*'s case was followed by this court in *QSR Brands Bhd v Suruhanjaya Sekuriti & Ors* [2006] 3 MLJ 164; [2006] 2 CLJ 572 which stated that at the substantive locus standi the court has to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour.

[64] In *R v Monopolies and Mergers Commission Exp Argyll Group plc* [1986] 1 WLR 763 Lord Donaldson summarised the relationship between standing at leave stage and at the substantive hearing as follows. At the leave stage an application should be refused only where the applicant has no interest whatsoever and is a mere meddlesome busybody. Where, however, the application appears to be arguable and there is no other discretionary bar such as dilatoriness, the applicant should be given leave and standing then be reconsidered as a matter of discretion at the substantive hearing. At this stage the strength of the applicant's interest will be one of the factors to be weighed in the balance.

[65] The underlying reason that leave is required for judicial review is to safeguard against the court being flooded and public bodies harassed by irresponsible applications. It is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived (see Lord Diplock in *National Federation* at pp 642–643).

[66] Now consider the basis of the respondents' application for judicial review (which were referred to earlier) and the grounds in granting the said application. MTUC and the other respondents claim that they and/or the public are entitled to the concession agreement and the audit report relating thereto on the basis that the government, as a fiduciary, is under a responsibility to provide safe and affordable treated water, water being an inalienable and

basic right to human existence and living; that there should not be unreasonable profiteering given that the supply and distribution of treated water had been privatised; and that they have a legitimate expectation that the government shall at all times ensure that its people has affordable access to treated water.

[67] The High Court granted the declaration on the ground, inter alia, that the concession agreement was executed with public interest in mind and that it is not detrimental to national security.

[68] In my view MTUC had not shown that it comes within any of the categories referred to by the Federal Court in *Tan Sri Othman Saat*'s case. For instance, MTUC had not shown that it has a statutory right to the concession agreement and the audit report or a breach of a statute which affects its interest substantially or that it has some genuine interest in having its legal position declared.

[69] This is not a case where MTUC or its members had been denied outright access to treated water in breach of its alleged fundamental right.

[70] This is a case where MTUC claims that the government, as a fiduciary, is under the duty to provide treated water at affordable tariffs and to ensure that the supply of treated water would not lead to unreasonable profiteering though arbitrary increase of water tariffs or means which are not transparent to the public. Lest it be misunderstood, let me make in clear that I am not passing judgment on the wisdom of privatising the supply and distribution of treated water or what should be the water tariffs. But looking at the evidence as a whole, I am unable to see that the Minister or the government had acted unlawfully or in breach of MTUC's legal right when it denied MTUC access to the concession agreement and the audit report. Thus, the High Court erred in granting the declaration to MTUC.

CERTIORARI

[71] Certiorari is a discretionary remedy for the control of an administrative action. The celebrated case on the scope of certiorari is *R v Electricity Commissions Exp London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, at p 205. Lord Atkin LJ in that case said:

> Whenever any body of persons having legal authority to determine questions affecting the right of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

[72] The scope of certiorari had since then been further extended. In *Rex v Northumberland Compensation Appeal Tribunal Exparte Shaw* [1967] 2 All ER 986 (CA); [1969] 1 All ER 208 (HL) it was held that the power to quash by an order of certiorari a decision of any body of persons having legal authority to determine questions affecting the rights of subject, was not only on the ground that it had acted outside its jurisdiction but also on the ground that there was an error of law apparent on the face of the record.

[73] Lord Diplock in *O'reilly v Mackman* [1983] 2 AC 237 concurred with Lord Reid's judgment in *Ridge v Baldwin* [1964] AC 40 that certiorari is not only limited to the decisions of any body of persons who had acted judicially in excess of their legal authority. The remedy of certiorari is now available to quash the decisions of any person or body of persons having legal authority on the grounds of error of law or breach of the rules of natural justice.

[74] For the purposes of this appeal, it is not necessary to discuss at length the circumstances in which certiorari may be granted as they may not be applicable to the facts before us. They have been discussed in numerous cases by our courts. See for instance *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 68; *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 FC; *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 PC; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[75] *De Smith's Judicial Review*, (6th Ed), at p 792 contains this concise statement: A person aggrieved ie one whose legal rights had been infringed or who had any other substantial interest in impugning an order, might be awarded a certiorari *ex debito justitiae* if he could establish any of the recognised grounds for quashing; but the court retained a discretion to refuse his application if his conduct was such as to disentitle him to relief. Only in highly exceptional circumstances did the court exercise its discretion in favour of an applicant who was not a person aggrieved: (*R v Thomas Magistrates' Court Exp Greenbaum* (1957) 55 LGR 129. In LGR, *R v Stafford Justice ex p Stafford Corpn* [1940] 2 KB 33 at 43–44).

[76] On the available evidence, it had not been shown that the Minister had acted in excess of his authority in rejecting MTUC's application for the concession agreement and the audit report. Neither did MTUC established that its legal right had been infringed. Thus the High Court erred in granting the order of certiorari to MTUC without determining whether or not MTUC had any legal right to the concession agreement and the audit report; or that the Minister had acted in breach of MTUC's legal right in denying access to those

documents.

MANDAMUS

[77] The court's discretionary power to make an order of mandamus is governed by s 44 of the Specific Relief Act 1950, subject of course to the proviso that the application satisfy the conditions specified in paras (a)–(e), namely:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

There was no finding by the High Court that there was an infringement of MTUC's right by reason of the Minister's decision rejecting its application.

[78] Section 45 of the Specific Relief Act 1950 further provides that the application for an order requiring any specific act to be done or foreborne by any person holding a public office, must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof. Upon scrutinising the affidavits in support of MTUC's application I am unable to conclude that the deponent of the said affidavits had complied with s 45 of the Specific Relief Act 1950. The legal effect of non-compliance with sss 44–45 of the Specific Relief Act 1950 means that the granting of the order of mandamus was bad in law and made without any clear legal basis.

CONFIDENTIALITY

[79] The issue here is whether the concession agreement and the audit report are protected under the Official Secrets Act 1972. The reason give by the Minister in refusing MTUC's request for the concession agreement and the audit report is that these documents are *SULIT* and *RAHSIA*.

[80] Japar bin Abu, who affirmed the affidavit on behalf of the Minister categorically states in paras 5 and 7 of his affidavit that the concession agreement and the audit report are classified as 'SULIT' AND 'RAHSIA' and that they had been tabled before the Cabinet:

5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT' berasaskan Klausa 45 Perjanjian Konsesi dimana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada Perjanjian tersebut.

7. Saya menegaskan di sini bahawa Laporan Audit adalah dokumen berperingkat yang dikategorikan sebagai 'RAHSIA' kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam Mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat 'RAHSIA' di bawah Jadual kepada seksyen 2A Akta Rahsia Rasmi, 1972.

[81] The term 'official secret' is defined in s 2(1) of the Official Secrets Act 1972 ('OSA') as 'any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B'.

[82] Wrongful communication of any official secret is an offence under s 8 of the OSA.

[83] The documents listed in the schedule include, among others, 'Cabinet documents, records of decision and deliberations including those of Cabinet Committee'. The averment in Japar bin Abu's affidavit that the concession agreement and the audit report are classified as 'SULIT' and 'RAHSIA' is not seriously challenged. These documents remain as classified document until they are declassified under s 2C or deleted under s 2A of the OSA: See *See Kok Kol @ See Liong Eng v Chong Kui Seng & Ors* [2009] MLJU 1098; [2010] 2 CLJ 481.

[84] The contention that these documents are not detrimental to national security or public interest is irrelevant in determining whether or not they are classified as official secret. Thus, in my view, the respondents' assertion that they had a legitimate expectation to those documents cannot be sustained to defeat an express provision in the OSA which prohibits wrongful or unauthorised communication of any official secret. The facts in *Takong Tabari v Government of Sarawak &Ors* [1995] 1 CLJ 403 are different. The issue in that case centered on admissibility of a report, namely, 'Department Board of Inquiry Report', certified under s 16A of the OSA as an official secret, which the plaintiff sought to admit in support of her claim against the defendants, arising from the death of her husband in an explosion which occurred in the premises occupied by the fourth defendant. The High Court in that case held

that nothing was done to show that the report relate to 'affairs of state' or that it had a prejudicial effect on public interest.

[85] By contrast, Japar bin Abu, in his para 8 of his affidavit dated 30 June 2010, filed in support of the appellant application for stay of the High Court order pending appeal, affirmed that disclosure of the said documents would have a prejudicial effect on public interest and on the administration of the government.

[86] In my judgment and for the reasons as aforesaid, the respondents had not, at the substantive hearing on the issue of locus standi, when all the evidence from both sides were available before the High Court, shown that they were entitled to the concession agreement and the audit report. It follows that the appellants' appeal should be allowed with costs here and below, which I so order, and that the orders of the learned JC be set aside.

Mohd Hishamudin JCA (dissenting):

[87] This is an appeal by the appellants against the decision of the High Court of Kuala Lumpur (Appellate and Special Powers Division) of 28 June 2010. By way of judicial review, Hadhariah Syed Ismail JC had granted the respondents the following orders prayed for in their judicial review application before the learned judicial commissioner:

(a) that a writ of certiorari to issue to quash the decision of the first appellant (the Minister of Energy, Water and Communication) ('the Minister') refusing to publish and/or disclose an audit report and a concession agreement; and

(b) that a writ of mandamus to issue to compel the Minister to publish and/or disclose the audit report and the concession agreement to the respondents and/or to the public within seven days of the order.

[88] The essence of the judicial review application is that despite repeated requests by the first respondent, the Malaysian Trade Union Congress ('the MTUC'), the first appellant, that is, the Minister, failed to disclose the following documents despite being obliged in law to do so:

(a) an agreement ('the concession agreement') of 15 December 2004 between:

(i) the Government of the State of Selangor (cited as the second respondent in the High Court proceedings, but is not a party in this appeal);

(ii) the Federal Government (the second appellant in this appeal); and

(iii) a company known as Syarikat Bekalan Air Selangor Sdn Bhd (also known by the acronym 'SYABAS' — but not a party either in the proceedings below or in this appeal); and

(b) an audit report justifying an increase of 15% in water tariffs ('the audit report').

[89] Although the concession agreement is a very important document for the public, since the contents of which affect the lives and basic needs (access to treated water) of people living in the State of Selangor, yet, rather strangely, this concession agreement was not permitted by the parties to it to be made available for public disclosure. Instead, there is a peculiar clause — cl 45 — in the concession agreement that states that the concession agreement may be disclosed to a third party only with the agreement of all the three parties to the agreement. The learned senior federal counsel, Datin Azizah, appearing for the appellants, when asked by this court, said that she did not know the rational for such a clause.

[90] Prior to this concession agreement, the Selangor State Government determined the water tariffs within the State of Selangor.

[91] Historically, until 15 March 2002, the Selangor Water Supply Department had been responsible for the distribution and treatment of water for the State of Selangor. On 15 March 2002, however, these services were privatised: the distribution and treatment components were separated with the non-profitable distribution aspect being taken over by Perbadanan Urus Air Selangor Bhd ('PUAS'). The profitable treatment aspect was taken over by a consortium comprising Puncak Niaga (M) Sdn Bhd ('Puncak Niaga'), Konsortium Abass Sdn Bhd and Syarikat Pengeluar Sdn Bhd ('SPLASH').

[92] PUAS suffered a loss of about RM2 billion and was unable to meet its commitments. The Government of the State of Selangor asked for financial aid from the Federal Government, but that request was rejected.

[93] However, in September 2004 it was announced that SYABAS would take over PUAS and the Federal Government would provide financial assistance of RM2.9 billion to SYABAS. At this juncture, Puncak Niaga held 70% interest in SYABAS, whilst Kumpulan Darul Ehsan Berhad, a company owned by the Selangor Economic Development Corporation, held the remaining 30%.

[94] With the execution of the 'confidential' concession agreement in December 2004, the water tariffs are now governed by the terms of the said agreement. Under the concession agreement, SYABAS is entitled to increase

the water tariffs only if it has fulfilled the performance indicators prescribed by a formula, in particular, if it has managed to achieve at least a 5% reduction in the non revenue water (NRW), that is to say, to reduce the percentage of NRW to 37.78 %.

[95] It is significant to note, however, that, earlier, on 19 April 2004, the Minister in a press statement had assured that any application by SYABAS to review tariffs would have to be considered from the context of results, capital expenditure and operational costs and from the context of successful reduction of NRW and distribution costs. The Minister had further assured that any suggestion to increase water tariffs would have to go through an evaluation exercise that would be strict and transparent, and with due regard being had to the views of the various stakeholders, including the consumers.

[96] But the truth was that there had been no meaningful discussion with the various stakeholders (including consumers) as had been assured by the Minister.

[97] Despite the secrecy of the concession agreement, parts of it, however, through discussions in the mass media, came to the knowledge of the public. The parts that came to public knowledge relate to NRW, the formulation of water tariffs, and provisions on profits. In particular, a research paper by one Kim Eng published on 25 April 2005 states:

(a) that water tariffs would be reviewed on 1 January 2006, and would be reviewed every three years thereafter, and that in the event of non-review within 90 days of a milestone, SYABAS would be entitled to compensation. The quantum of review would be based on a formula which set out performance indicators;

(b) that these performance indicators included a reduction of NRW; and

(c) that the Federal Government would be paying compensation to SYABAS if tariffs were not reviewed on 1 January 2006.

[98] In April 2005, reports surfaced which stated that SYABAS was entitled to the 1 January 2006 review. However, as at 1 January 2006, SYABAS did not get the review;

[99] In October 2006, it was declared by the Minister that the water tariffs were reviewed and increased by 15%. This was supposedly on the basis of the performance indicators having been achieved including the NRW component.

[100] The respondents contend that the basis of the review is questionable as:

(a) although an audit was reported to have been conducted in 2005, yet a review was not given on 1 January 2006;

(b) SYABAS does not appear to have prepared a report setting out what concrete efforts were taken to achieve the NRW reduction of 5% for the year 2005;

(c) media reports state that the NRW reduction programme was stopped by a court order in or about August 2005; and

(d) reports are contradictory about the entitlement of SYABAS to an increase of tariffs.

[101] Be that as it may, it was subsequently revealed that an audit report was in fact produced to Cabinet and that audit report confirmed that SYABAS had achieved the 5% reduction in NRW and thus entitled to an increase in water tariff with effect from 1 November 2006.

[102] On 7 November 2006, Mr Rajasekaran, the Secretary General of the Malaysian Trade Union Congress (the first respondent, MTUC), on behalf of MTUC, wrote to the Minister, the first appellant, seeking the latter to make public the audit report and the concession agreement before 16 November 2006. The letter reads:

KONGRES KESATUAN SEKERJA MALAYSIA

Malaysian Trade Union Congress

MTUC/2307 MTUC

PEJUANG KAUM PEKERJA

7hb November 2006 SEJAK 1949

YB Datuk Seri Dr. Lim Keng Yaik

Menteri Tenaga, Air dan Komunikasi

Putrajaya

Faks: 03 88893712

YB Datuk Seri Dr. Lim Keng Yaik

Merujuk kepada kenyataan akhbar YB Datuk mengumumkan kenaikan 15 peratus tariff air dan bayaran pampasan RM152 juta kepada Syabas.

Atas dasar keterbukaan, kami memohon agar YB mempublisitikan laporan Umum Auditor bersama dengan perjanjian sepakat di antara Kerajaan Persekutuan dan Kerajaan Negeri Selangor bersama Syabas. Kami amat sukacita sekiranya laporan tersebut disebarkan kepada pengetahuan umum sebelum 16 November 2006.

Kami rela untuk mengambil laporan tersebut dari pejabat YB sekiranya diizinkan.

Kerjasama pihak YB dalam perkara ini amat kami hargai.

Sekian terima kasih.

Yang benar,

t.t.

(G.RAJASEKARAN)

Setiausaha Agung

Salinan: YAB Perdana Menteri

En. Teo Yen Hua, Ketua Setiausaha Dua

[103] There was no reply by the Minister to this letter.

[104] So, on 23 November 2006 Mr Rajasekaran, on behalf of MTUC, again wrote to the Minister seeking disclosure of the two documents. This reminder letter reads:

KONGRES KESATUAN SEKERJA MALAYSIA

Malaysian Trade Union Congress

MTUC/2307 MTUC

PEJUANG KAUM PEKERJA

SEJAK1949

23hb November 2006

YB Datuk Seri Dr. Lim Keng Yaik

Menteri Tenaga, Air dan Komunikasi

Putrajaya

Faks: 03 88893712

YB Datuk Seri Dr. Lim Keng Yaik

PER: MTUC Mengulangi Permintaan Sesalinan Laporan Audit Air dan Perjanjian Sepakat

Merujuk kepada surat kami bertarikh 7hb November 2006, MTUC tidak menerima sebarang maklumbalas dari Menteri sehingga ke hari ini.

Kami mengajukan sekali lagi permintaan tersebut, iaitu mendapatkan Laporan Audit Jabatan Air Kebangsaan dalam tempoh masa tujuh hari. Laporan tersebut akan mendalamkan pengetahuan kami mengenai kerasionalan kenaikan tariff air. Atas dasar keterbukaan dan pemerintahan yang bersepadu kami sangat berharap agar Menteri akan bersetuju dengan permintaan ini.

Memandangkan kenaikan tariff air berkait rapat dengan perjanjian sepakat di antara Kerajaan Persekutuan, Kerajaan Selangor dan Syabas kami berharap agarsalinan perjanjian tersebut diberikan kepada kami.

Sekiranya kami tidak menerima sebarang maklum balas dalam tempoh masa tujuh hari dari Menteri Tenaga, Air dan Komunikasi, maka kami akan menganggap Menteri tidak berminat untuk memberi maklum balas terhadap permintaan kami.

Kerjasama pihak YB dalam perkara ini amat kami hargai.

Sekian terima kasih.

Yang benar,

t.t.

(G.RAJASEKARAN)

Setiausaha Agung

Salinan: YAB Perdana Menteri

En. Teo Yen Hua, Ketua Setiausaha Dua

[105] On 4 December 2006 the Minister replied to the MTUC's letter. The Minister stated in his letter that the audit report and the concession agreement were 'not appropriate' ('tidak sesuai') to be disclosed to the public. The Minister gave a reason for the stand that he took: that the two documents had been categorised as 'CONFIDENTIAL and SECRET'. The Minister's letter reads:

PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN

62668 PUTRAJAYA

Telefon: 603-8883 6000

Faks: 603-88891335

Ruj.Kami: KTAK: BFA (S) 22/12/1 Klt.2 (26)

Tarikh: 4 Disember 2006

SEGERA DENGAN FAKS: 03-8024 3224

En. G. Rajasekaran

Setiausaha Agung

Kongres Kesatuan Sekerja Malaysia (MTUC)

Wisma MTUC

10-5, Jalan USJ 9/5T

47620 SUBANG J AY A

Tuan,

PENYELARASAN KADAR TARIF AIR OLEH SYABAS

Dengan hormatnya saya diarah menarik perhatian tuan kepada perkara di atas dan surat tuan bertarikh 7 November 2006 adalah berkaitan.

2. Untuk makluman pihak tuan, Kementerian ini berpendapat bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS serta Laporan Audit tidak sesuai untuk didedahkan kepada umum memandangkan dokumen berkenaan adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT DAN RAHSIA' kerajaan.

3. Walau bagaimanapun, keputusan Laporan Audit tersebut telah dibentangkan kepada Jemaah Menteri dan telah dipersetujui. Laporan audit tersebut juga telah mengesahkan bahawa SYABAS telah berjaya mencapai sasaran pengurangan NRW sebanyak 5% yang telah ditetapkan dan mereka layak untuk menikmati kenaikan tariff yang berkuat kuasa mulai 1 November 2006.

4. Kerjasama pihak tuan amatlah dihargai dan didahului dengan ucapan terima kasih.

Sekian.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

(JAPAR ABU)

b.p. Ketua Setiausaha

Kementerian Tenaga, Air dan Komunikasi Malaysia

Edaran Dalaman

KSU

TKSUII

KP JBA

[106] It is to be observed that it is not the Minister's position that he is under no obligation to disclose the two documents. His reason for his refusal to accede to the MTUC's request is merely because of the '*SULIT/RAHSIA* status' of the documents.

[107] But it is also to be noted that the Minister's letter does not explain as to why the two documents had to be 'categorised' (*'dikategorikan'*) as 'SULIT/RAHSIA'. The letter does not say that disclosure of the two documents would be detrimental to public interest or security. Significantly the letter makes no mention of either the Official Secrets Act 1972 (OSA) or cl 45 of the concession agreement.

[108] It is further to be noted that the Minister's letter also discloses that an

audit report had been tabled before the Cabinet and had been accepted by the Cabinet. The letter also states that the audit report had confirmed that SYABAS had successfully achieved the target of reducing NRW by 5% and hence was eligible to an increase in tariffs with effect from 1 November 2006.

[109] MTUC as well as the other respondents felt aggrieved by the Minister's response.

[110] The respondents' application for judicial review was filed on 15 January 2007.

[111] In the proceedings before the High Court, the State Government of Selangor (the second respondent in the judicial review proceedings before the High Court) informed the court (through the written submission of the State Legal Adviser) that it had no objection to the disclosure of the concession agreement to the applicants (the respondents in this appeal).

[112] SYABAS too, in the course of the proceedings before the High Court, had, vide its letter of 14 April 2010 addressed to the applicants' solicitors (the applicants there are the respondents in this appeal), also categorically stated that it had no objection to the disclosure of the concession agreement to the applicants.

[113] In this judgment I shall primarily confine myself to the five issues raised in the memorandum of appeal, namely:

(a) that the learned judicial commissioner erred in concluding that the respondents have locus standi to commence the judicial review application;

(b) that the learned judicial commissioner erred in failing to hold that one of the documents, the audit report is an official secret document protected by s 2A of the Official Secrets Act 1972;

(c) that the learned judicial commissioner erred in holding that the first appellant failed to take into consideration the legitimate expectation of the respondents as affected parties;

(d) that the learned judicial commissioner erred in failing to take into account the express provision of the concession agreement that it must remain confidential; and

(e) that the learned judicial commissioner erred in her finding that the documents contained no information that could be detrimental to public interest or safety.

THE ISSUE OF LOCUS STANDI

[114] Under O 53 r 2(4) of the Rules of the High Court 1980, the respondents/applicants must establish that they have been adversely affected by the decision of the Minister not to make public the concession agreement and the audit report.

[115] In my judgment, the respondents are adversely affected by the refusal of the Minister to disclose the contents of the concession agreement and the audit report.

[116] First, water is a basic necessity of life and, therefore, access to treated water is a basic human right. If a citizen has to pay in order to have treated water, the cost to him ought to be minimal and affordable.

[117] Second, the respondents are residents of Selangor and, therefore, are consumers of treated water in the State of Selangor. They do not have alternative access to treated water in Selangor. This is because SYABAS has a monopoly over distribution of treated water in Selangor. Any increase in tariffs would have an adverse impact on their lives as consumers of a basic commodity.

[118] Third, the increase in water tariffs is triggered by the concession agreement and the audit report. Hence the respondents, as the consumers, should be entitled to know whether the concession agreement and the audit report justify the increase in tariffs. With the full knowledge as to what the concession agreement provides and what the audit report says, they would be in a position to form an opinion based on facts and to make an appropriate representation to SYABAS and to the governments (the Selangor State Government and the Federal Government), if need be, pertaining to the increase in the tariffs.

[119] Fourth, the locus standi threshold for judicial review actions is lower than in private law actions. In *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal said (at pp 171–172 (MLJ); pp 541–542 (CLJ)):

> [15] By contrast, certiorari and the other prerogative remedies were classified as public law remedies which permitted a far more liberal threshold locus standi test to be met. Hence, Lord Wilberforce said in *Gouriet v Union of Post Office Workers* [1978] AC 435 that in applications for prerogative writs in the environment of public law enforcement the courts have allowed applicants 'liberal access under a generous conception of locus standi.'

A [16] It is to rid this dichotomous approach which often produced injustice that O 53 in its present form was introduced. There is a single test of threshold locus standi for all the remedies' that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular B applicant has an obviously sufficient personal interest in the legality of the action impugned. See, *Finlay v Canada* (1986) 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all C such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is to tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases D which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:

> E [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realization of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the F betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

G

[120] Fifth, the second to the 12th respondents are citizens of Malaysia and water users in the concession area. They stand in a fiduciary relationship with the Government of Malaysia (*Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169). By reason of this fiduciary H relationship it is the duty of the Federal Government to ensure that the provision of treated water is adequately regulated to ensure meaningful access, and ensuring that profiteering does not occur from water provision services. This duty, particularly, the duty to protect consumers, imposed on the Federal I Government, is further entrenched by the Water Services Industry Act 2006. I shall say more of this fiduciary relationship principle later.

[121] Sixth, the 13th and 14th respondents sue as children (by their next friends). They reside with their parents within the concession area. They too are

consumers of treated water and, as children, are further protected by law, in particular, the Child Act 2001 which decrees that paramount consideration be given to their interest and welfare.

[122] Finally, the first respondent, MTUC, is a society and a federation of trade unions. It represents workers' interests. It is the oldest national center representing Malaysian workers and has approximately 500,000. Its headquarters is located in Subang Jaya, Selangor. It had written two letters to the Minister seeking disclosure of the concession agreement and the audit report, and whose request had been refused by the latter. Although the Minister had refused the request, the Minister had never treated the first respondent as a mere busybody. The Minister in his reply had never taken the position that per se the first respondent had no right to have sight of the two documents sought; or that he is under no duty to make public disclosure of those documents. The Minister had merely taken the position it was in no position to disclose the documents by reason of their 'confidential' status. The relevant Ministry's officer, Encik Japar, in his affidavit, also takes a similar position.

WHETHER THE AUDIT REPORT IS PROTECTED BY THE OFFICIAL SECRETS ACT 1972 ('THE OSA')

[123] In my judgment, the audit report is not protected by the OSA. There is no evidence that prior to its being produced before the Cabinet the audit report had been classified as official secret under the OSA. Indeed the affidavit of Encik Japar bin Abu, the Division Secretary of the Water Services Division of the Ministry in question merely states:

> 7. Saya menegaskan di sini bahawa Laporan Audit adalah Dokumen berperingkat yang dikategorikan sebagai 'RAHSIA' Kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah Berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, Dokumen tersebut merupakan Dokumen peringkat 'Rahsia' di bawah Jadual seksyen 2A Akta Rahsia Rasmi 1972.

[124] 'Official secret' is defined by s 2 of the OSA as:

> 'official secret' means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential', or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of s State or such public officer appointed under section 2B.

[125] Section 2A of the OSA states:

> *Addition, deletion or amendment of the Schedule 2A.*

A The Minister may, from time to time, by order published in the Gazette, add to, delete from, or amend any of the provisions of the Schedule hereto.

[126] Strictly, this s 2A is irrelevant and should not have been referred to by
B Encik Japar. However, the schedule provides:

SCHEDULE

[Section 2A]

C Cabinet documents, records of decisions and deliberations including those of Cabinet committees;

[127] It is to be observed that the term 'Cabinet documents' appears in the above schedule. Is the audit report a 'Cabinet document'? The OSA, however,
D does not define the term 'Cabinet documents'.

[128] With respect, I do not think that the audit report could legally be said to be a Cabinet document. With respect, the above officer (Encik Japar) has
E misunderstood the schedule to the OSA or rather had adopted a literal interpretation of the term 'Cabinet document'. His interpretation of the schedule to the OSA is that a non official secret document would automatically become an official secret document the moment it is produced before the Cabinet. This is a misconception. In this regard, it must be appreciated that,
F first, the audit report, before the Cabinet meeting (Encik Japar, in his affidavit, discloses that the Cabinet meeting in question was held on 11 October 2006), was already in existence independently of any Cabinet paper, and had never been classified as an official secret prior to it being produced before the Cabinet. There is much force in Encik Malik Imtiaz's argument that it would
G be nonsensical for any document of any nature that was put before the Cabinet to immediately/automatically become an official secret. Such an interpretation would be perverse as any document that the Cabinet happened to consider would ipso facto become a 'state secret' instantly, despite the same never being labelled as such prior to the Cabinet meeting.

H

[129] Second, Encik Japar, in his affidavit, never states that the Cabinet had made a decision declaring the audit report to be an official secret under the OSA.

I **[130]** Third, Encik Japar, in his affidavit, never says that the audit report was prepared solely for the purpose of making it part of a Cabinet paper; and, fourth, Encik Japar did not explain why the audit report must be classified as 'official secret' (apart from merely stating the fact that the audit report had been tabled before the Cabinet and invoking the schedule to the OSA). Indeed, he

never states in his affidavit that the disclosure of the audit report would be detrimental to the national security or public interest.

[131] Now, s 17A of the Interpretation Acts 1948 and 1967 requires that legislation be construed purposively:

> Regard to be had to the purpose of Act
>
> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[132] In *Takong Tabari v Government of Sarawak & Ors* [1995] 1 CLJ 403 Richard Malanjum J (as he then was) explained the purpose of the OSA:

> In my view the (Official Secrets) Act deals mainly with the prevention of unauthorised disclosure of official secrets and thus created offences for any such infringement. I do not think it is intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest.

[133] In my judgment, in order to qualify as a 'Cabinet document' for the purpose of the schedule, the audit report must have been prepared solely for the purpose of making it part and parcel of a Cabinet paper, and it is not the case here. The audit report was already in existence before the Cabinet paper was prepared.

[134] In any case, even assuming for a moment that the audit report is a Cabinet document, in my judgment, on the authority of *Takong Tabari*, in order to qualify as an official secret under the OSA, it must be proven that disclosure of the audit report is detrimental to national security or public interest. Again it is not the case here. The audit report had been examined by the learned judicial commissioner during the proceedings before her and she has made this pertinent observation:

> Having read the audit report myself, I had this to say. The report contains information relevant to the concession agreement, in particular to the increase in water tariff. But, I was of the view that the report did not contain information detrimental to the national security or public interest. As with the concession agreement, here also I could foresee there will be public discussion and criticism against the government.

A THE LEGITIMATE EXPECTATION ISSUE

[135] The appellants appear to contest the following statement made by the learned judicial commissioner:

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> To sum up, the first respondent's refusal to disclose the concession agreement and the audit report was made without taking into consideration the legitimate expectation of a member of the public who is affected in the decision making process to be treated fairly.

C

[136] There is a legitimate expectation here on the part of the respondents on the following grounds. First, treated water is a basic necessity of life and right to treated water is a basic human right.

D

[137] Second, as I have said earlier when dealing with the issue of locus standi, the respondents are residents of Selangor and, therefore, are consumers of treated water in the State of Selangor. By reason of the monopolistic position of SYABAS, they do not have alternative access to treated water in Selangor. Any increase in tariff would have an adverse impact on their lives as consumers
E of a basic commodity.

[138] Third, earlier, on 19 April 2004, the Minister in a press statement had assured that any application by SYABAS to review tariffs would have to be
F considered from the context of results, capital expenditure and operational costs and from the context of successful reduction of NRW and distribution costs. The Minister had further assured that any suggestion to increase water tariffs would have to go through an evaluation exercise that would be strict and transparent, and with due regard being had to the views of the various
G stakeholders, including the consumers. But what had really happened after the assurance was that, in breach of the assurance, there had been no meaningful discussion between the Minister/Federal Government and the stakeholders (including consumers).

H **[139]** Fourth, as has been pointed out in the early part of this judgment, despite the secrecy of the concession agreement, parts of it, somehow, had surfaced and had come to public knowledge. It is now known to the public that water tariffs would be reviewed on 1 January 2006, and would be reviewed every three years thereafter, and that in the event of non-review within 90 days
I of a milestone, SYABAS would be entitled to compensation. The quantum of review would be based on a formula which set out the performance indicators. These performance indicators include a reduction of NRW; and that the Federal Government would be paying compensation to SYABAS if tariffs were not reviewed on 1 January 2006.

[140] Now, as a matter of law, a legitimate expectation arises when there is a clear and unambiguous representation made by a public authority, and in the present case, by a Minister. The principle of substantive legitimate expectation is rooted in the concept of fairness, and by this principle the Minister is required to give effect to the representation that he had made earlier to the public earlier.

[141] In *Food Corpn of India v Kamdhenu Cattle Feed Industries* AIR 1993 SC1601 the Supreme Court of India said:

> There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power as it is unrealistic, but provides for control of its exercise by judicial review.

[142] This principle of legitimate expectation was discussed and applied by our Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1.

[143] In *Shri Dinesh Trivedi, MP & Ors v Union of India & Ors* [1997] 4 SCC 306 the Supreme Court of India held:

> 16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare.

[144] At a later part of its judgment, at para 18, the court went on to hold:

> 18. The case of SP Gupta v Union of India decided by a seven-Judge Constitution Bench of this Court, is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In that case, the consensus that emerged amongst the judges was that in regard to the functioning of Government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

CLAUSE 45 OF THE CONCESSION AGREEMENT

[145] At the outset it is important to note that, unlike in the case of the audit report, the appellants, in refusing to disclose the concession agreement, are not relying on the OSA. The appellants are merely relying on a contractual obligation to the other parties to the agreement, namely, the Selangor State Government and SYABAS, by reason of cl of 45 of the concession agreement. In this regard, I refer to para 5 of Encik Japar's affidavit. It states:

> 5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT' berasaskan Klausa 45 Perjanjian Konsesi di mana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada Perjanjian tersebut.

[146] The appellant's position is that the contractual obligation of confidentiality is paramount and takes precedence.

[147] With respect, I think that the Minister's (Government of Malaysia's) contractual obligation (by reason of cl 45) to the Selangor State Government and SYABAS can no longer be a used as a basis of the Minister's refusal for the disclosure of the concession agreement. For at the beginning of this judgment it has already been pointed out that both the Selangor State Government and SYABAS (the only parties to the concession agreement, besides the Government of Malaysia) are already prepared to disclose the concession agreement to the applicants. The learned judicial commissioner in her judgment said:

> The concession agreement is a tripartite agreement. It was revealed in the written submission of the first and third respondents that cl 45 of the said agreement restraint disclosure to any third party without prior mutual agreement of the parties unless disclosure is required by law or the rules of any stock exchange. It is also evident from the second respondent's written submission that they have no objection to disclose the concession agreement to the applicants. Vide their letter of 14 April 2010 addressed to the applicants' solicitors, SYABAS has categorically stated that they also have no objection to the disclosure of the concession agreement.

[148] The appellants, either in the memorandum of appeal or in their submissions, have never challenged the correctness of the above statement of facts by the learned judicial commissioner.

[149] Whilst it is true that the change in position taken by the Selangor State Government and SYABAS was only after the date of the Minister's letter, still, that was a change in position that took place while proceedings before the High Court were still on-going. Therefore, the appellants ought to have conceded

before the High Court that cl 45 of the concession agreement, by reason of the change in position of the Selangor State Government and SYABAS, was no longer an issue before the court.

[150] In any case such contractual obligation of non-disclosure (if it still exists) does not stand in the way of judicial consideration of public interest. The appellant's claim to confidentiality must be examined by reference to public interest. Confidentiality would only be upheld if disclosure will be detrimental to public interest. In *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 the High Court of Australia said (at p 52):

> But it can scarcely be a relevant detriment to the government that publication of material concerning its action will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the part workings of government, even if it be not public property, so long as it does not prejudice the community in other respects.
>
> Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs.

[151] In the present case, the appellants have not suggested that disclosure of the concession agreement would be detrimental to public interest. On the contrary, we have the following pertinent observation of the learned judicial commissioner who had examined the concession agreement, and this is what she has said:

> Having read through both the documents, in particular, the concessions agreement, *I had no doubt that it contains no information detrimental to the national security or public interest*. But I could foresee its disclosure may lead to public discussion and criticism against the government.

FINDINGS OF THE JUDICIAL COMMISSIONER

[152] The appellants take the position that the learned judicial commissioner erred in holding that the documents contained no information that could be detrimental to public interest or safety.

[153] With respect there is no merit at all in this argument.

[154] In the course of the proceedings the documents were made available by the appellants to the learned judicial commissioner without any objection by the appellants when the learned judicial commissioner requested to examine them. As I have pointed out earlier, the learned judicial commissioner, having examined both documents, had made a finding that there is nothing in the documents, if disclosed to the appellants or to the public, would be detrimental to public interest or safety.

[155] The appellants on their part have not explained in their affidavits in what way that disclosure of the documents to the respondents or to the public would be detrimental to public interest or safety. It is elementary that he who alleges must prove.

WHETHER THE MINISTER UNDER A DUTY TO DISCLOSE THE TWO DOCUMENTS

[156] It is the contention of the learned senior federal counsel for the appellants, Datin Azizah, that regardless of the OSA or cl 45, the Minister is under no legal duty to disclose the documents as there is no statutory provision which obliges the Minister to make such disclosure. Citing s 44 of the Specific Relief Act 1950, learned senior federal counsel argues that, in the absence of such a statutory provision, no order of mandamus can be issued against the Minister.

[157] Now with respect, I do not think that that learned senior federal counsel can raise such an argument as this is not one of the issues raised in the appellants' memorandum of appeal. Learned senior federal counsel should only confine her submission to the five issues raised in the memorandum of appeal.

[158] Moreover, the appellants in their affidavit, and the Minister in his letter to MTUC, had never taken the position that the Minister is under no obligation to disclose the two documents either to the public or to the respondents, in particular, MTUC. The position that the appellants had taken all along was merely that legally they are prevented from disclosing the documents by reason of cl 45 of the concession agreement and the OSA.

[159] In any case, in my judgment the legal duty or obligation is not confined only to legal duties or obligations prescribed by statutes. A court of law has the power to issue an order of mandamus pursuant to s 44 of the SRA to compel any person holding public office (such as a Minister) to carry out a duty if that person by reason of law, written law or otherwise, is under a duty or obligation to do a particular act and has failed to do so. In the present case the Minister is under a legal duty to make disclosure. That legal duty arises by

reason of the fact that a fiduciary relationship exists between the government and the citizens, particular, when it is to be considered that treated water is a basic necessity off life and that access to treated water is a basic human right, that SYABAS enjoys a monopolistic position in relation to consumers of treated water in Selangor; and that under s 3(1) of the Water Services Industry Act 2006 the 'Federal Government shall have executive authority with respect to all matters relating to water supply systems and water supply services'. In the context of this fiduciary relationship it is to be recalled that the Minister had given his assurances that the government would be strict and transparent in considering any application by SYABAS for any increase in tariff, and would take into account the views of the various stakeholders, including consumers. A similar assurance had been given by the Federal Government in Parliament in the explanatory statement when tabling the Water Services Industry Bill (later passed by Parliament as the Water Services Industry Act 2006):

> Objektif polisi nasional bagi industri Perkhidmatan bekalan air dan pembentungan ialah: (a) untuk mewujudkan satu struktur telus dan berintegrasi bagi perkhidmatan bekalan air dan pembentungan yang memberikan Perkhidmatan yang efektif dan efisien kepada pengguna-pengguna; b) untuk mengawal kepentingan-kepentingan jangka panjang pengguna-pengguna; c) untuk mengawal tariff dan memastikan perkhidmatan bekalan yang mampu diperolehi atas dasar saksama; dan d) untuk mewujudkan satu system kebertanggungjawapan dan tadbiran yang efektif di antara pengendali-pengendali dalam industri perkhidmatan bekalan air dan pembentungan.

[160] In *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169, Gopal Sri Ram in delivering the judgment of the Court of Appeal said (at p 312 (MLJ); pp 193–194 (CLJ)):

> There is nothing startling in the trial judge holding the first and fourth defendants (State Government of Selangor and the Government of Malaysia) to be fiduciaries in public law. In a system of Parliamentary democracy modeled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power — the public body — may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.
>
> So, in *Premachandra v Major Montague Jayawickrema* [1994] 2 Sri LR 90, at p 105, GPS De Silva CJ when delivering the judgment of the Supreme Court of Sri Lanka said:

A

> There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted (Emphasis added.)

B

In the course of his judgment the learned Chief Justice referred to the following passage extracted from Administrative Law by HWR Wade (5th Ed):

> Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely — that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.

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D

[161] Further, a duty to make disclosure on the part of the appellants to the respondents also arises by reason of the principle of legitimate expectation explained earlier, a principle that has come into play by reason of the public assurances that the Minister had made.

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Appeal allowed with costs.

Reported by Kohila Nesan

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